

Promoting the Rights of Older Persons: Addressing Adult Guardianship and Substituted Decision-Making in Health Care

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Abstract

Population aging has captured the attention of the international human rights movement and raised new questions regarding the legal framework for promoting and protecting human rights. Laws that promote “guardianship” of older citizens and other systems of substituted decision-making are particularly controversial. While many governments insist that these laws are necessary to protect older citizens, the disability rights movement and the UN Committee on the Rights of Persons with Disabilities has offered a strong critique of adult guardianship, viewing it as an inherent violation of an individual’s right to legal capacity. Interestingly, this debate regarding substituted decision-making has arisen while the international community is considering whether to draft a new multilateral human rights treaty dedicated to the rights of older citizens. If the UN ultimately decides to undertake this project, then the drafters of the new treaty will need to confront, directly, the ethics of adult guardianship and consider whether it can be retained (albeit with increased safeguards to prevent abuse) or must be rejected as an inherent violation of human rights.

Keywords : Human Rights, Disability Rights, Elder Rights, Legal Capacity, Guardianship

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I. Introduction

Population aging is the most significant demographic change of the 21st century. Older persons currently make up at least ten percent of the world's population and they will likely constitute twenty percent of the global population by the year 2050. At that point, for the first time in the course of human history, there will be more older persons than children on our planet. This profound change will reach all regions of the world, including the Asia-Pacific region.¹ Governments are trying to prepare for the effects of this demographic change, which will affect nearly all areas of public policy, including the labor market, housing, and health care.²

Population aging also has captured the attention of the international human rights movement and raised new questions regarding the legal framework for promoting and protecting human rights.³ Of course, older persons do not form one homogenous group. Some individuals will enjoy reasonably good health, adequate financial resources, and a supportive family as they age. But many older citizens will face discrimination, isolation, declining health, poverty, abuse, and disempowerment.⁴ It is for this reason that the United Nations and many non-governmental organizations have begun to focus on older persons and to question the laws and policies that affect them. For example, as one ages, the right to access health care on an equal basis with others becomes especially important because most of us will develop one or more impairments as we age. Similarly, our right to exercise legal capacity and make informed decisions regarding our health care is more likely to be violated as we age.

Laws that promote “guardianship” of older citizens and other systems of substituted decision-making are particularly controversial.⁵ Many governments insist that these laws are necessary to protect older citizens, whether from their own mistakes or from unscrupulous rogues. However, the disability rights movement has offered a strong critique of adult guardianship, viewing it as a fundamental violation of an individual's right to legal capacity.

¹ It is estimated that the number of older persons in the Asia-Pacific will triple in a 40-year period, from 414 million in 2010 to 1.25 billion by 2050. See Report of the United Nations High Commissioner for Human Rights, U.N. Doc. E/2012/51 (2012), at 3, http://ap.ohchr.org/documents/dpage_e.aspx?si=E/2012/51.

² United Nations High Commissioner for Human Rights, *Background to the Independent Expert on the Enjoyment of All Human Rights by Older Persons*, <http://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/IEOlderPersons.aspx>.

³ See, e.g., U.N. General Assembly, *Measures to enhance the promotion and protection of the human rights and dignity of older persons*: G.A. Res. 70/164, U.N. Doc. A/RES/70/164 (Feb. 22, 2016), <http://www.refworld.org/docid/56d7e8d64.html>.

⁴ See, e.g., Jaclynn M. Miller, *International Human Rights and the Elderly*, 11 Marq. Elder's Advisor 342 (2010) (discussing, among other problems faced by older persons, the phenomena of “elder abuse”).

⁵ See, e.g., Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law*, 25 Ga. St. U. L. Rev. 527, 559-60 (2009); Sally Balch Humne, *World Congress to National Summit: Moving Guardianship Excellence to Reality*, 6 J. Int'l Aging Law & Policy 1-33 (2013).

The UN Committee on the Rights of Persons with Disabilities has also endorsed this view, by adopting a “General Comment” that interprets the UN Convention on the Rights of Persons with Disabilities⁶ so as to require states parties to replace systems of substitute decision-making with systems of supported decision-making.⁷ The Committee has frequently referred to this General Comment when reviewing governments’ reports on implementation of the CRPD and urged governments to abolish compulsory care orders, as well as all forms of detention on the ground of disability and other legal mechanisms that restrict individual autonomy on the basis of disability.⁸

Interestingly, this debate regarding substituted decision-making has arisen while the international community is considering whether to draft a new multilateral human rights treaty dedicated to the rights of older citizens.⁹ If the United Nations decides to undertake this project, then the drafters of the new treaty would need to confront, directly, the ethics of adult guardianship and consider whether it can be retained (albeit with increased safeguards to prevent abuse) or must be rejected as an inherent violation of human rights.¹⁰

Part II of this article explores the foundational debate on whether the international community requires new legal instruments to promote the rights of older persons. This section of the article reviews the existing UN human rights mechanisms, the perceived

⁶ Convention on the Rights of Persons with Disabilities, *G.A. Res. 61/106*, U.N. Doc. A/RES/61/106 (Jan. 24, 2007) [hereinafter “CRPD”].

⁷ Committee on the Rights of Persons with Disabilities, *General Comment 1 – Article 12: Equal recognition before the law*, CRPD/C/GC/1 (Apr. 11, 2014), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en.

⁸ See examples of the recommendations to states given by the Committee on the Rights of Persons with Disabilities below, in Part IV. It should be noted that the U.N. Human Rights Committee (the treaty-monitoring body for the International Covenant on Civil and Political Rights [hereinafter “ICCPR”]) takes a more nuanced approach to the question of compulsory treatment and detention. Although urging states to provide community-based services for persons with psychosocial disabilities and less restrictive alternatives to confinement, the Human Rights Committee has also stated that the deprivation of liberty could be consistent with the ICCPR when it is: necessary and proportionate for the purpose of protecting the individual in question from serious harm or preventing injury to others, applied as a measure of last resort and for the shortest appropriate period of time, and accompanied by adequate procedural and substantive safeguards established by law. See U.N. Human Rights Committee, *General Comment No. 35 – Article 9 (Liberty and Security of Person)*, CCPR/C/GC/35, para. 19 (Dec. 16, 2014), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/35&Lang=en.

⁹ For a review of the debate on whether a new treaty is justified, see generally Israel Doron and Itai Apter, *The Debate Around the Need for an International Convention on the Rights of Older Persons*, 50 (5) *The Gerontologist* 586-593 (2010).

¹⁰ For analysis of the types of safeguards that might be used, see Hurme, *supra* note 5; the Yokohama Declaration, Adopted by the First World Congress on Adult Guardianship Law, Yokohama, Japan, Oct. 4, 2010; revised and amended by the Fourth World Congress on Adult Guardianship Law, Erkner/Berlin, Germany, Sept. 16, 2016, <http://www.international-guardianship.com/pdf/Draft%20Yokohama%202016%20International%20Part-1.pdf>.

“gap” in the legal framework, and the current campaign for a new international treaty.¹¹ This section of the article concludes that a new treaty could offer many concrete advantages but that governments are unlikely to reach a consensus in the near future on either the need for or the content of such a treaty. Thus, it is important for activists to make full use of existing human rights treaties in order to promote and protect the rights of older persons.

Part III of the article focuses on the Convention on the Rights of Persons with Disabilities (CRPD).¹² This treaty is relevant because many older persons live with impairments and the CRPD could be used as an advocacy tool to remedy discrimination against them. Moreover, even if the UN does eventually draft a treaty that is specific to older persons, then the drafting process and certain provisions in the CRPD will likely serve as model. Thus it is important to analyze the CRPD and some of the debates that arose during the drafting process.

Part IV of the article focuses on the right to legal capacity in the CRPD, which is essential to the enjoyment of other rights but has proven particularly controversial. Although the UN Committee on the Rights of Disabilities apparently views all systems of adult guardianship as a violation of the CRPD,¹³ many governments do not agree with this interpretation, as demonstrated by the reservations and “interpretive declarations” that were filed by states upon ratification and the positions that have been taken by governments since ratification. The article concludes, in Part V, by considering the implications of this disagreement should the UN decide to draft a new treaty on the rights of older persons.

II. International Human Rights Law and Older Persons: Is There a Legal Gap?

There are already numerous international policy documents that address the subject of aging. For example, the Vienna International Plan of Action on Ageing was adopted in 1982 at the World Assembly on Ageing in Vienna and endorsed later that year by the UN General Assembly.¹⁴ It includes 62 recommendations for action in a wide range of policy areas, including housing, health and nutrition, employment, and social welfare. In 2002, the

¹¹ While this article is confined to international (rather than regional) instruments, it should be noted that regional treaties are being developed to promote the rights of older persons. For example, *see* the Inter-American Convention on the Human Rights of Older Persons, adopted 15 June 2015,

http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp. As of this writing, the treaty had been signed by five member states but had not obtained any ratifications and thus is not yet in force.

¹² CRPD *supra* note 6.

¹³ Committee on the Rights of Persons with Disabilities, *supra* note 7.

¹⁴ U.N. General Assembly Resolution on the Question of Ageing (Dec. 3, 1982), U.N. Doc. A/Res/37/51, <http://www.un.org/documents/ga/res/37/a37r051.htm>.

Second World Assembly on Ageing adopted two key documents: a Political Declaration and the Madrid International Plan of Action on Ageing.¹⁵ Both documents include commitments from governments to implement measures to address challenges posed by ageing and improve the quality of older persons' lives. The two documents also set forth more than 100 recommendations for actions within three broad priority areas: development; advancing health and well-being; and ensuring enabling and supportive environments.¹⁶ However, those soft-law instruments do not take a rights-based approach and they lack enforcement processes. Advocates for the rights of older persons have therefore turned their attention to the UN human rights system and demanded that it pay more attention to the situation of older persons.

The UN has two main types of mechanisms for monitoring and promoting human rights: the “charter-based” mechanisms (which are created directly through the General Assembly or the Human Rights Council) and the “treaty-based” mechanisms.¹⁷ In general, the treaty-based mechanisms are considered stronger because they arise from legally binding human rights treaties and are monitored by independent committees of experts who serve in their individual capacities. However, a human rights treaty binds only the “states parties” – the term given to countries that have agreed to be bound by the treaty through ratification or accession. Some multilateral treaties, such as the Convention on the Rights of the Child, have received almost universal ratification¹⁸ while others have a disappointingly small number of states parties.¹⁹ In contrast, the charter-based mechanisms apply to all members of the UN, simply because they have ratified the UN Charter.

Perhaps the best known charter-based mechanism is “universal periodic review,” (UPR), which is overseen by the Human Rights Council and requires governments to report regularly on the implementation of all rights recognized in the Universal Declaration of Human Rights.²⁰ While UPR certainly applies to older citizens, it is easy for their situation to become lost in the wide range of issues that are discussed during the review of any particular country. Thus, in recent years, the General Assembly and the Human Rights

¹⁵ Political Declaration and Madrid International Plan of Action on Ageing from the Second World Assembly on Ageing in Madrid, Spain (Apr. 12, 2002), http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf.

¹⁶ *Id.* at Section II, Recommendations for action.

¹⁷ For information on the different mechanisms, see Office of the High Commissioner for Human Rights [hereinafter “OHCHR”], <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>.

¹⁸ U.N. Treaty Collection, Ch. IV (15), Convention on the Rights of the Child, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

¹⁹ See, e.g., U.N. Treaty Collection, Ch. IV (13), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en (which has only 48 states parties).

²⁰ For information on universal periodic review, see OHCHR, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

Council have created certain additional charter-based mechanisms, which are not as prominent as UPR but focus directly on the rights of older citizens.

For example, in 2010, the General Assembly established an Open-Ended Working Group on Ageing (OEWG)²¹ with a mandate to “consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering the feasibility of further instruments and measures.”²² The OEWG has now held six sessions and it is scheduled to meet again in December 2016.²³ The sessions organized by the OEWG have shed light on urgent problems faced by many older persons, including poverty, inadequate access to health care, violence and abuse, and the financial and legal challenges of planning for end-of-life care. It has also investigated how to encourage governments to better implement the Madrid International Plan of Action on Ageing (MIPAA). Most importantly (for this article) the OEWG has debated whether a new binding treaty on the rights of older persons should be drafted, adopted by the General Assembly, and opened for ratification by governments.

The United Nations Human Rights Council also used its powers to appoint an Independent Expert on the Enjoyment of All Human Rights by Older Persons.²⁴ The enabling resolution gives the Independent Expert a mandate to assess the existing legal framework and the impact of the Madrid framework. When the Independent Expert was first appointed there was some concern among activists that the Human Rights Council created the mechanism simply as a means of delaying (perhaps indefinitely) the decision on whether to endorse the drafting of a new human rights treaty on the rights of older persons. The Independent Expert’s first report indicates, however, that she is interested in the concept of a new treaty. For example, she is paying close attention to national laws that prohibit age discrimination and also to certain regional instruments, which could potentially serve as a model for an international convention on the rights of older persons.²⁵

One of the advantages of drafting a new treaty devoted to the rights of older citizens is the enforcement structure that would accompany it. Currently, each of the ten “core” human rights treaties in the UN system is monitored by a committee of independent

²¹ U.N. General Assembly Resolution, *Follow Up to the Second World Assembly on Ageing*, U.N. Doc. A/Res/65/182 (Dec. 21, 2010),

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/523/46/PDF/N1052346.pdf?OpenElement>.

²² For information and links to reports by the group, see Open-Ended Working Group on Ageing, <http://social.un.org/ageing-working-group/>.

²³ *Id.*

²⁴ The Human Rights of Older Persons, H.R.C. Res. 24/20, U.N. Doc. A/HRC/RES/24/20 (Oct. 8, 2013), <http://www.unescap.org/resources/hrc-resolution-2420-human-rights-older-persons>.

²⁵ *Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons* (July 8, 2016), U.N. Doc. A/HRC/33/44, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/147/83/PDF/G1614783.pdf?OpenElement>.

experts who develop expertise in their particular treaty and meet regularly (generally two or three sessions per year, depending on the number of states parties to the treaty). The committee's primary role is to oversee the international "reporting process," which is non-coercive but has nonetheless generated significant law and policy reforms at the domestic level.

Once a government ratifies a core human rights treaty it becomes obligated to submit an "initial report" (normally within two or four years of ratification) to the relevant treaty-monitoring body and then to submit "periodic reports" every four years. The state's report should describe the legislative and policy steps that it is taking to comply with the treaty and any barriers to implementation. The treaty-monitoring committees also receive reports from non-governmental organizations (which are known as "NGO reports", "alternative reports" or "shadow reports"). The NGO reports comment on the state report and often describe problems that a government would minimize or fail to disclose. Indeed, NGOs are now exercising significant influence in the reporting process – a development that certainly helps to educate the treaty-monitoring bodies but often irritates governments. Even the Chinese government (which does not permit any critical advocacy from its domestic NGOs) has had to tolerate the embarrassment of critical "shadow reports" during the international reporting process. This is because international NGOs routinely submit shadow reports when China is being reviewed by a human rights treaty body.²⁶

Once a government's official report, the NGO reports, and any written responses from the government to the committee's follow-up questions have been submitted to the treaty-monitoring body it schedules an "interactive dialogue" with representatives of the government. The interactive dialogue is essentially a public hearing and NGOs frequently send representatives to observe the meetings in Geneva. The UN has also started to provide live "webcasts" of the meetings so that even activists who cannot travel to Geneva can observe the committee's questioning and governments' responses. Following the interactive dialogue, the treaty-monitoring committee drafts "Concluding Observations" that identify what the committee sees as concerns and makes recommendations on how a government can better comply with its obligations under the relevant treaty. The Concluding Observations are public documents (they are posted on the website of the UN) and can provide support for those who are advocating for law and policy reforms at the domestic level.

In one sense, this is a fairly "soft" enforcement process because no treaty-monitoring body can force a government to comply with its Concluding Observations. However, as

²⁶ For example, when China was being reviewed by the UN Committee on the Rights of Persons with Disabilities, international NGOs (including the International Disability Alliance and Human Rights in China) submitted shadow reports from outside of China. For analysis of how these reports influenced the Committee's review of China, see Carole J. Petersen, *The Convention on the Rights of Persons with Disabilities: Using International Law to Promote Social and Economic Development in the Asia Pacific*, 35(2) U. Haw. L. Rev. 821, 851-53 (2013).

most stages of the review process are open to the public a government that does poorly in the review will suffer a certain loss of credibility in the international community. As a result, governments do generally make an effort to respond to at least some of the Concluding Observations, in order to show progress when it is time for the next periodic review by the treaty-monitoring body.²⁷

The treaty-monitoring bodies also issue “General Comments,” which are not formally binding on states but are considered to be highly authoritative interpretations of states’ treaty obligations. In recent years NGOs have actively participated in the discussions that generate General Comments – another sign of the expanding role of civil society in the creation and application of international human rights law. In some cases, the treaty-monitoring bodies are also empowered to receive complaints from individuals who allege that their rights under the relevant treaty have been violated by their government. Although the committees cannot compel governments to comply with their decisions on these complaints (which are referred to as “individual communications”) the decisions are considered to be “highly authoritative” and help to build a body of jurisprudence regarding the meaning of treaty obligations in particular situations.

Proponents of a new treaty argue that none of the existing human rights treaties expressly recognizes older persons as a group that is particularly vulnerable to discrimination or abuse.²⁸ There is also no treaty-monitoring body that is dedicated solely to the rights of older citizens. Indeed, with the exception of the Convention on the Rights of All Migrant Workers and Members of their Families, the existing treaties do not even expressly prohibit age discrimination (although, as noted below it may be considered a form of discrimination on the ground of “other status”). There is, proponents argue, a compelling need to draft a treaty that expressly prohibits age discrimination and defines the rights of

²⁷ For a comparison of the British and Hong Kong governments’ responses to the CEDAW Committee, see Carole J. Petersen and Harriet Samuels, *The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organizations in the United Kingdom and Hong Kong*, 26 *Hastings Int’l & Comp. L. Rev.* 1-50 (2002). For examples of the Hong Kong government’s responses to the Committee on the Elimination of Racial Discrimination, see Carole J. Petersen and Kelley Loper, *Equal Opportunities Law Reform in Hong Kong: The Impact of International Norms and Civil Society Advocacy*, in *Reforming Law Reform: Perspectives on Law Reform Processes in Hong Kong and Beyond* (Michael Tilbury, Simon N.M. Young, and Ludwig Ng eds., 2014).

²⁸ See, e.g., OHCHR, *UN Human Rights Chief offers her support for a new Convention on the rights of older persons* (Apr. 8, 2014),

<http://www.ohchr.org/EN/NewsEvents/Pages/RightsOfOlderPersons.aspx>; *Towards a Binding Convention on the Rights of Older Persons*, GAROP (Jul. 29, 2015),

<http://www.rightsofoldpeople.org/towards-a-binding-convention-on-the-rights-of-older-persons/>. See also Jaclynn M. Miller, *supra* note 4; Israel Doren and Itai Apter, *International Rights of Older Persons: What Difference would a New Convention Make to the Lives of Older Persons?* 11 *Marq. Elder’s Advisor* 367 (2010) (reviewing the arguments for and against a new treaty).

older persons in detailed terms that are directly relevant to the phenomena of aging.²⁹

On December 20, 2012, the UN General Assembly adopted a resolution to consider proposals for an international legal instrument to promote and protect the rights and dignity of older people. This was an important development but it does not necessarily indicate that a new treaty will be drafted and opened for ratification. In fact, there is still significant disagreement among governments as to whether a new treaty is desirable. This tension was clear during both the fifth and sixth sessions of the OEWG, held in 2014 and 2015. In contrast, the non-governmental organizations that have participated in OEWG meetings have been more unified in support of a new treaty. This is almost certainly because NGOs who work in the field tend to believe that nonbinding instruments (such as the MIPAA) are too easily ignored by governments. They have thus openly called for the establishment of a “Convention on the Rights of Older Persons.”

Opponents of a new treaty argue that the existing body of human rights law clearly applies to older persons and should, if applied correctly, offer comprehensive protection for their rights. They acknowledge that governments may need policy advice on how these rights should be applied to the situation of older persons but believe that the existing soft law instruments can provide that guidance. Opponents of a new treaty can also rely upon the fact that there is already a shortage of resources in the UN human rights treaty system. This problem has been highlighted in a “treaty body strengthening process,” which was initiated more than ten years ago in an effort to identify and address the major factors that affect the efficiency and efficacy of the human rights treaty-monitoring bodies.³⁰ As part of this process, the UN High Commissioner for Human Rights even published (in 2006) a proposal to eliminate the separate treaty-monitoring bodies and create one unified standing treaty body, which would apply consistent interpretations of overlapping treaty obligations.³¹ Although the proposal did not receive much support, many of the problems that it identified – the shortage of resources and the backlog of reports – are still unresolved.³²

An additional problem is that governments frequently fall behind in their reporting obligations. Indeed, a conscientious government that ratifies all or most of the core human

²⁹ For a summary of arguments that proponents of a new treaty often make, see *Towards a Convention on the Rights of Older People*, HelpAge Int'l (2016), <http://www.helpage.org/what-we-do/rights/towards-a-convention-on-the-rights-of-older-people/>.

³⁰ For a collection of documents produced as part of the effort to strengthen the treaty monitoring bodies and improve efficiency, see *Treaty Body Strengthening*, OHCHR, <http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx> (noting the growth and challenges of the treaty body system).

³¹ Navanethem Pillay, *Strengthening the United Nations Human Rights Treaty Body System: A report by the United Nations High Commissioner for Human Rights* (June 2012), at 28 (discussing the proposal and its rejection) (on file with author).

³² *Id.*, at 20-28.

rights treaties is continuously drafting reports.³³ The treaty-monitoring bodies have made an effort to reduce the burden by streamlining the reporting process (e.g. encouraging states to prepare one “core document” for all of the treaty-monitoring bodies plus a shorter document responding to a “list of issues” that the treaty-monitoring body wishes to focus on during its review).³⁴ However, it is inevitable that a new treaty on the rights of older persons would require additional resources, both at the national level and within the UN human rights system.

As of this writing (November 2016), it would appear that the two sides of this debate are essentially at a stalemate. But that means that we are unlikely to see a specialist treaty on the rights of older persons anytime soon. Thus, it would be wise for advocates to actively participate in the reporting processes for the existing body of human rights treaties so as to better educate the treaty-monitoring bodies regarding the situation of older persons. With the exception of the Convention on the Rights of the Child, virtually all of the existing UN human rights treaties can be applied to older persons. The two broadest treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Taken together, these two foundational treaties include almost all of the rights stated in the non-binding Universal Declaration of Human Rights. The ICCPR, which currently has 168 states parties, protects political rights and civil liberties, including freedom of conscience and religion, freedom of expression, association, assembly, and freedom from torture.³⁵ The ICESCR, which currently has 164 states parties, protects the right to work and the right to enjoy certain basic entitlements, including an adequate standard of living, education, and the highest attainable standards of physical and mental health.³⁶ Both the ICCPR and the ICESCR obligate states parties to respect the rights of all citizens without discrimination on the grounds of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.”³⁷ The ICCPR further obligates governments to enact laws prohibiting discrimination.³⁸

Although “age” is not expressly listed in either the ICCPR or the ICESCR as a

³³ *Id.*, at 26-28.

³⁴ *Id.*, at 37-57.

³⁵ U.N. Treaty Collection, Ch. IV (4), ICCPR (Dec. 16, 1966), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-4&chapter=4&clang=_en.

³⁶ U.N. Treaty Collection, Ch. IV (3), ICESCR (Dec. 16, 1966), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-3&chapter=4&clang=_en.

³⁷ ICCPR, art. 2(1); ICESCR, art. 2(2) (emphasis added).

³⁸ ICCPR, art. 26 (providing that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

prohibited ground of discrimination,³⁹ the term “other status” can and should be interpreted as prohibiting laws and policies that discriminate against older persons. This interpretation of the ICCPR was applied by the UN Human Rights Committee (the treaty-monitoring body for the ICCPR) when it received an individual communication from an Australian citizen who alleged that he was the victim of age discrimination. The Committee observed, in *Love v. Australia* that:

While age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26 [of the ICCPR], the Committee takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of “other status” under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26.⁴⁰

Similarly, the Committee on Economic, Social and Cultural Rights recognized, as early as 1995, that the prohibition on discrimination on the grounds of “other status” can include age discrimination.⁴¹ In 2009, the Committee confirmed that age “is a prohibited ground of discrimination in several contexts,” despite the fact that age is not expressly mentioned in the non-discrimination clause of the ICESCR.⁴²

This is not to suggest that governments can never treat persons differently on the basis of age. For example, many nations set minimum ages for certain activities (e.g. getting married, driving a car, voting in elections, and drinking alcohol) and for certain entitlements (e.g. social security and pensions). Mandatory retirement ages are more problematic (because

³⁹ Only one treaty in the U.N. human rights treaty system expressly lists age as a prohibited ground of discrimination. See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *G.A. Res. 45/158*, A/RES/45/158, art. 7 (Dec. 18, 1990),

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>. However, governments have been slow to ratify that treaty and it still has only 48 states parties. See U.N. Treaty Collection, Ch. IV (4), art. 13, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en

⁴⁰ See, e.g., John K. Love et al. v. Australia, Communication No. 983/2001, U.N. Doc. CCPR/C/77/D/983/2001, ¶ 8.2 (2003) (in which the U.N. Human Rights Committee concluded that a mandatory retirement age of 60 for pilots did not violate the ICCPR).

⁴¹ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 6: The economic, social and cultural rights of older persons, ¶¶ 11, 12 (Nov. 24, 1995), http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/INT_CESCR_GEC_6429_E.pdf.

⁴² U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (interpreting art. 2, para. 2, of the ICESCR), U.N. Doc. E/C.12/GC/20 (Jul. 2, 2009), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en.

they interfere with an adult's right to work) but even these limitations have been held permissible where based upon reasonable and objective criteria.⁴³ However, any law or policy that restricts, on the basis of age, an adult's right to make decisions regarding his/her health care would almost certainly be deemed to violate both the ICCPR (because it would constitute discrimination, contrary to Article 26) and also the ICESCR, which protects the right to enjoy the "highest attainable standard of physical and mental health."⁴⁴

In addition to the ICCPR and ICESCR, several of the other specialist treaties can be applied to promote the rights of older persons, including the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Discrimination is often intersectional, a principle that was recognized by the CEDAW Committee when it issued a General Comment on the rights of older women.⁴⁵

The next two sections of the article investigate the potential role of the CRPD, both as an advocacy tool in its own right and as a possible model if the ongoing campaign for a convention on the rights of older persons eventually proceeds to the drafting stage. Part III of the article reviews the potential relevance of the treaty as a whole, while Part IV focuses on the debate surrounding Article 12 of the CRPD, which protects the right to legal capacity.

III. The Convention on the Rights of Persons with Disabilities: The Paradigm Shift and Its Potential Relevance to the Rights of Older Persons

As noted in the introduction to this article, older persons do not constitute a homogenous group and it should not be assumed that all older persons could claim rights under the CRPD. However, given that many older citizens develop impairments, advocates for the rights of older persons should study the CRPD and apply it, where relevant, to address violations of human rights. Moreover, if the United Nations does eventually agree to draft a multilateral human rights treaty that is specific to older persons, then it is likely that activists will look to the drafting process, and also to many provisions in the CRPD, for guidance. Thus it is important to analyze the CRPD and its potential impact.

The CRPD is often described as constituting a "paradigm shift" because it rejects the

⁴³ John K. Love et al. v. Australia, *supra* note 40, ¶ 8.3.

⁴⁴ ICESCR, art. 12.

⁴⁵ See Committee on the Elimination of Discrimination Against Women, General Recommendation No. 27 on Older Women and Protection of their Human Rights, CEDAW/C/GC/27 (Dec. 16, 2010), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/53/PDF/G1047253.pdf?OpenElement>.

outdated medical and social welfare approaches to disability⁴⁶ and provides legal authority for the social and human rights models of disability. The social model is a generic term for a theory of disability that was developed in the 1960s by British activists, as part of their advocacy for the right to live independently and as full members of the community.⁴⁷ The social model distinguishes between an impairment (defined as an injury, illness, or condition that causes a loss or difference of physiological or psychological function) and disability, which is the loss of opportunity to take part in society on an equal level with others due to social and environmental barriers. Under the social model, disability is a form of social oppression, which is perpetuated by physical and social barriers. Similarly, many organizations that lobby for a new Convention on the Rights of Older Persons argue that it is not simply the aging process but rather the “stigmatizing and dehumanising ageist attitudes and behaviour” that cause suffering among older persons.⁴⁸

The human rights model of disability is similar to the social model in that it views people who live with impairments as rights holders and recognizes that they are often more disabled by physical and attitudinal barriers than by individual impairments.⁴⁹ However, the human rights model expressly includes economic, social, and cultural rights (what some scholars refer to as “second generation rights”), which are necessary for many persons to live in dignity and achieve equality.⁵⁰

The CRPD is also historic because of the manner in which it was drafted. Traditionally, treaties were drafted primarily by government delegations during closed-door meetings. This enabled governments to maintain a certain control over the language of the treaty and made it easier for governments to eventually ratify a multilateral treaty without having to file significant reservations. In the case of the CRPD, however, there was an unusually high level of input from civil society, far exceeding that for previous human rights treaties.⁵¹ This was partly because it was the first human rights treaty to be drafted in the age of the

⁴⁶ The medical model focused on individual “afflictions” and the need for treatment, while the welfare model focused on the need to protect and support “disabled” individuals.

⁴⁷ See Union of the Physically Impaired Against Segregation, *The Fundamental Principles of Disability* (London, 1976). See also Vic Finkelstein, *The Social Model of Disability Repossessed* (Disability Archive UK at Leeds University, 2001), <http://www.leeds.ac.uk/disability-studies/archiveuk/finkelstein/soc/a20mod/a20repossessed.pdf> (last visited Jan. 10, 2013).

⁴⁸ HelpAge Int'l, *supra* note 29 (noting that a new human rights treaty is necessary in part to help replace “stigmatizing and dehumanising ageist attitudes and behaviour”).

⁴⁹ See Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 Syracuse J. Int'l L. & Com. 287 (2007); Rosemary Kayess and Phillip French, *Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 Hum. Rts. L. Rev. 1, 2, at 1 (2008).

⁵⁰ For discussion of the shortcomings of the social model and the importance of including economic and social rights in the “disability human rights” model, see Michael Ashley Stein, *Disability Human Rights*, 95 Calif. L. Rev. 75 (2007).

⁵¹ Maya Sabatello and Marianne Schulze, eds., *Introduction to Human Rights and Disability Advocacy*, 13, 23-24 (U. Penn. Press, 2014).

internet (making it much easier for nongovernmental organizations to monitor and participate in the process) but also because the disability rights movement insisted on their right to participate, invoking the phrase “nothing about us without us” as their guiding principle.⁵² Activists thus organized at the local and regional levels and submitted written comments to the UN’s Ad Hoc Drafting Committee for the CRPD. Governments also were urged to appoint citizens with disabilities to their official delegations and to actively consult disability rights organizations.⁵³ As a result, the final text of the CRPD is a long and detailed document, much more detailed than previous specialist human rights treaties and heavily influenced by disability rights advocates. This may be one reason that many governments are now reluctant to endorse the drafting of a new human rights treaty on the rights of older citizens – they realize that any new human rights treaty will have to be drafted in the same open and participatory fashion as the CRPD, making it difficult for governments to control the content.

The open drafting process and the large number of submissions to the Ad Hoc Drafting Committee for the CRPD also generated vigorous debates on the language of certain provisions.⁵⁴ One of the key debates was on the question of whether and how to define disability. Some activists took the position that a definition of disability using medical terminology would undermine the commitment to the social model. Others wanted a detailed definition because they feared that persons living with certain types of impairments (such as psycho-social disabilities) might otherwise be excluded from laws and policies that purported to implement the treaty at the national level.

The final version of the CRPD therefore reflects a compromise: although “disability” is not defined in the definitions section of the treaty, the CRPD states (in Article One) that the purpose of the treaty is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. . .” and that “[p]ersons with disabilities *include those* who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁵⁵ Thus the treaty expressly includes certain groups who are living with impairments (including many impairments that are common among older persons). It is important to note, however, that Article One does

⁵² See U.N. Secretary General Kofi Annan, *Message on the adoption of the CRPD* (Dec. 13, 2006), <http://www.un.org/press/en/2006/sgsm10797.doc.htm> (last visited Jun. 1, 2014) (describing the CRPD as “the first [human rights treaty] to emerge from lobbying conducted extensively through the internet”).

⁵³ Tara J. Melish, *Perspectives on the Rights of Persons with Disabilities: The UN CRPD: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 Hum. Rts. Brief 37 (Winter of 2007).

⁵⁴ See the official website of United Nations Enable for drafts of the treaty, submissions, lists of attendees, and other documents arising from the eight sessions of the Ad Hoc Committee that drafted the treaty, <http://www.un.org/disabilities/default.asp?id=1423> (last visited June 1, 2014).

⁵⁵ CRPD, art. 1 (emphasis added).

not purport to define the *full scope* of the term “persons with disabilities,” leaving that issue to be determined through activism and the continuing efforts of the disability rights movement.⁵⁶ It also emphasizes the core principle of the social model – that medically related “impairments” do not create disability. Rather, disability is caused by the interaction of socially constructed barriers with our individual conditions.

It should be noted, however, that many domestic laws continue to use medical criteria to define disability. The UN Committee on the Rights of Persons with Disabilities regularly criticizes governments for their failure to amend these definitions so as to align domestic laws with the CRPD. However, it is not surprising that national governments would prefer to have a “bright line,” in order to determine who can access certain benefits and also to determine who has a right to sue for disability discrimination. Similar questions may arise if a new Convention on the Rights of Older Persons is drafted. For example, should a new treaty define “older person” and if so should the definition be based solely on age or on the context? While the Convention on the Rights of the Child adopted “under 18” as the definition of a child, one might argue that the concept of “older person” could vary depending on the context and also upon a country’s cultural norms, economic system, average life expectancy, and average age of retirement from full-time employment.

The CRPD does expressly define the scope of the *discrimination* that should be prohibited in domestic law. The definition begins by stating that “discrimination on the basis of disability” means: “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁵⁷ This part of the definition is somewhat similar to the definitions of discrimination in the ICERD and the CEDAW.⁵⁸ However, the CRPD differs from the earlier treaties because it goes on to state that discrimination includes the “denial of reasonable accommodation,”⁵⁹ which is defined as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”⁶⁰ This language helped to generate a debate on whether the CRPD was intended to create “new rights” or simply to ensure that persons with disabilities enjoy the rights that have been previously stated in other human rights treaties.⁶¹ However, it

⁵⁶ Maya Sabatello, *A Short History of the Movement, in Human Rights and Disability Advocacy* 19 (Maya Sabatello and Marianne Schulze, eds., 2014).

⁵⁷ CRPD, art. 2.

⁵⁸ Compare CEDAW, art. 1, and ICERD, art. 1, with CRPD, art. 2.

⁵⁹ CRPD, art. 2.

⁶⁰ CRPD, art. 2.

was essential to include this language because the concept of reasonable accommodation was missing in many jurisdictions when the CRPD was adopted.

The drafters of the CRPD also recognized the need to take a holistic approach to rights and to move away from the false dichotomy between civil liberties and economic, social, and cultural rights.⁶² The Vienna Declaration that was adopted at the 1993 World Conference on Human Rights recognized the indivisibility of rights and the importance of giving equal value to economic, social and cultural rights.⁶³ The CRPD takes this principle very seriously and often combines, within one article of the treaty, a civil liberty with a right to accessible facilities and services. For example, Article 21 not only affirms that persons with disabilities enjoy freedom of expression (which is sometimes categorized as a “negative right” on the theory that the state can fulfill its obligations by simply not interfering with citizens’ rights to express opinions and access information) but also obligates states parties to provide information in accessible formats and facilitate the use of sign language, Braille, and other alternative means of communication.⁶⁴ When defined in this manner, freedom of expression becomes a richer concept, one that has meaning for citizens with different abilities and resources. However, this holistic approach to rights also contributed to the fact that the CRPD is longer and more detailed than most of the earlier human rights treaties, leaving governments that agree to ratify the treaty with a much bigger task and also less flexibility.

In essence, the CRPD obligates states parties to review virtually all policies and programs that affect persons with disabilities.⁶⁵ State parties to the CRPD are also obligated to modify or repeal discriminatory laws, regulations, and customs or practices and ensure that public authorities and institutions comply with the treaty.⁶⁶ State parties also assume an obligation to address the underlying prejudice against persons with disabilities⁶⁷ and to increase accessibility in both the public and private spheres.⁶⁸ States also must provide effective enforcement mechanisms for the rights stated in the treaty and ensure that persons with disabilities enjoy “effective access to justice” on an equal basis with others, including

⁶¹ See generally, Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 Hum. Rts. Q. 494 (2008) (concluding that the CRPD innovates on traditional human rights concepts by establishing “disability human rights,” which are specific to persons with disabilities yet still rooted in the universality of rights).

⁶² *Id.*

⁶³ World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 1-5, U.N. Doc. A/CONF.157/24 (Part I) (July 12, 1993).

⁶⁴ CRPD, art 21.

⁶⁵ CRPD, art 4(1)(a) and (c).

⁶⁶ CRPD, art 4(1)(b) and (d).

⁶⁷ CRPD, art 8.

⁶⁸ CRPD, art. 9

any procedural and age-appropriate accommodations that may be required to facilitate their effective role as participants in legal proceedings.⁶⁹ Persons with disabilities also have the right to participate in political and public life⁷⁰ and to participate fully in the implementation of the treaty and any monitoring processes.⁷¹

Certain provisions in the CRPD are particularly relevant to older persons and might serve as a model if a Convention on the Rights of Older Persons is ever drafted. For example, Article 25 of the CRPD protects the right to the “highest attainable standard of health without discrimination” and provides detailed policy guidance on how health services should be provided. Article 25 also obligates state parties to prohibit discrimination in the provision of health insurance and life insurance. Perhaps most importantly, Article 25 requires that health care be provided on the basis of “free and informed consent” and prohibits any “discriminatory denial of health care or health services or food and fluids on the basis of disability.”

The social model of disability originated in the de-institutionalization movement and thus the CRPD places great emphasis on the right to live in the community. This is also becoming an issue for older persons because the tradition of living with one’s grown children in old age has been abandoned in many countries. Thus Article 19 of the CRPD might provide a model provision – it provides that persons with disabilities have a right to live independently and in the community. It also obligates states parties to provide the necessary residential support and services, so that individuals can continue to reside in their own homes.⁷²

Security of the person is also a core value of the CRPD. Article 15 strictly prohibits any form of medical experimentation on persons with disabilities. Similarly, Article 14 of the CRPD protects liberty and security of the person, providing that persons with disabilities must not be arbitrarily deprived of their liberty and that the existence of a disability alone must not be used to justify detention.⁷³ This provision allows the Committee on the Rights of Persons with Disabilities to question governments on a broad range of potential violations, including civil commitment proceedings, compulsory medical treatment, and conditions inside medical and detention facilities.

But the most controversial provision in the CRPD is probably Article 12, which protects the right to legal capacity and is necessary to virtually every other right in the treaty.⁷⁴ This provision – and the ongoing dispute over its impact on traditional laws governing adult guardianship – is analyzed in the next section of the article.

⁶⁹ CRPD, art. 13(b).

⁷⁰ CRPD, art. 29.

⁷¹ CRPD, art. 33.

⁷² CRPD, art. 19.

⁷³ CRPD, art. 14(1)(b).

⁷⁴ CRPD, art. 12(4).

IV. The Right to Legal Capacity under the CRPD and the Future of Adult Guardianship

During the drafting of the CRPD, the right to legal capacity was one of the most hotly debated provisions.⁷⁵ One of the points of contention was the question of whether there should be a distinction between the legal capacity to enjoy rights and the legal capacity to act. After a good deal of debate, the drafters agreed on the following text, which makes it clear that persons with disabilities have a right to exercise their legal capacity:

Article 12: Equal Recognition Before the Law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Virtually all experts on disability rights agree that Article 12 obligates states to promote greater autonomy for persons with disabilities and to move away from systems of “substituted decision-making” in favor of systems of “supported decision-making.” There is, however, debate on whether the concept of guardianship and other forms of substituted decision-making must be completely abolished. Moreover, the term “supported decision-making” is not defined in the treaty and it is a complex concept, one that was

⁷⁵ See, e.g., Arlene Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge, 2014), especially ch. 7; Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?*, 34 *Syracuse J. Int'l L. & Com.* 429–62 (2007).

new to many governments when the CRPD was drafted. Even now – ten years after the treaty was approved by the General Assembly and opened for ratification – there are disagreements on what constitutes supported decision-making. Most experts would agree that it can involve many different types of support (some quite informal) as well as different levels of support, depending on the individual and also on the context. Ideally, for most decisions, supported decision-making will consist of a network of trusted family or friends who assist a person in an informal manner. Many (but not all) experts would agree that supported decision-making could also take a more formal form and include, for example, a health care proxy, an advance care directive, an enduring power of attorney, or a personal ombudsman. The unifying feature, however, is that the individual should always be the primary decision maker in a system of supported decision-making.⁷⁶ Thus, the primary purpose of the support system is not to make decisions that we think are “best” for the individual but rather to ascertain and communicate the will of the individual.

When governments began to ratify the CRPD, it became clear that many governments planned to maintain, at least for the immediate future, guardianship laws and other legal regimes of substituted decision-making, so long as the restrictions on legal capacity were considered truly “necessary” and were subject to certain safeguards. Recognizing, however, that the disability rights community and the treaty-monitoring body would likely interpret Article 12 differently, many governments decided, when they ratified the CRPD, to file reservations or interpretive declarations concerning Article 12.

For example, when Singapore filed its notice of ratification of the CRPD (in 2013) it filed reservations to several articles, including the following reservation to Article 12:

The Republic of Singapore’s current legislative framework provides, as an appropriate and effective safeguard, oversight and supervision by competent, independent and impartial authorities or judicial bodies of measures relating to the exercise of legal capacity, upon applications made before them or which they initiate themselves in appropriate cases. The Republic of Singapore reserves the right to continue to apply its current legislative framework in lieu of the regular review referred to in Article 12, paragraph 4 of the Convention.⁷⁷

⁷⁶ See, e.g., Soumitra Pathare & Laura S. Shields, *Supported Decision-Making for Persons with Mental Illness: A Review*, 34 Pub. Health Revs. 1-40 (2012), http://www.publichealthreviews.eu/upload/pdf_files/12/00_Pathare.pdf; Terry Carney, *Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?* 4 Laws (2015) 37-59, doi:10.3390/laws4010037.

⁷⁷ U.N. Treaty Collection, Ch. IV(15), CRPD, Declarations and Reservations: Singapore, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec (in which declarations are listed alphabetically by nation).

Singapore will be criticized for this reservation when its Initial Report on its implementation of the CRPD is reviewed by the UN Committee on the Rights of Persons with Disabilities.⁷⁸ Indeed, some legal experts have taken the position that reservations to Article 12 are not permissible under Article 46 of the CRPD (which prohibits reservations that are incompatible with the object and purpose of the treaty).⁷⁹

But Singapore's position is not that different from that of many other governments. In essence, Singapore is taking the position that paragraph 4 of Article 12 qualifies paragraphs 1 and 2 and that "measures that relate to the exercise of legal capacity" can include restrictions on legal capacity. Many other governments share that view and made this clear by filing interpretive declarations.⁸⁰ A declaration differs from a reservation in that the government is not reserving the right to violate a provision of the treaty. Rather the state is "declaring" that it interprets a provision in the treaty in a particular manner. Normally the motivation for filing an interpretative declaration is to preserve the right to maintain a certain pre-existing law or policy, which might otherwise be considered questionable under the requirements of the treaty. However, some of the declarations that have been filed with respect to Article 12 are so broad that they have the substantive effect of a reservation.

For example, Egypt filed a "declaration" to Article 12 of the CRPD stating that "persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility (ahliyyat al-wujub) but not the capacity to perform (ahliyyat al-'ada'), under Egyptian law."⁸¹ Similarly, Estonia filed a very broad declaration stating that it interpreted Article 12 so as to permit restrictions on "a person's active legal capacity when such need arises from the person's ability to understand and direct his or her actions."⁸²

It should be noted that some of the governments that filed reservations or declarations are making a sincere effort to comply with Article 12. Nonetheless, they are finding it very

⁷⁸ Singapore's Initial Report was due in August 2015, two years after it became a state party. However, even if it submits its Initial Report soon, there is a large backlog of country reports (at least 48) to be reviewed in "future sessions" before Singapore is reviewed. For a list of country reports that have been filed and are awaiting review, see: UN Committee on the Rights of Persons with Disabilities, Future Sessions, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=800&Lang=en.

⁷⁹ See, e.g., International Disability Alliance, Legal Opinion on Article 12 of CRPD (June 21, 2008), <http://www.internationaldisabilityalliance.org/resources/legal-opinion-article-12-crp> (endorsed by numerous legal experts from sixteen countries).

⁸⁰ Other state parties to the treaty also have the right to object to a reservation. However, in view of the goal of universal ratification of multilateral human rights treaties, objecting states generally do not insist that the reserving state withdraw its reservation in order to become a state party. Thus, when a government objects to another government's reservations, it will typically conclude the objection with a statement making it clear that the objection will not preclude the entry into force of the treaty between the two states.

⁸¹ U.N. Treaty Collection, Ch. IV(15), CRPD, Declarations and Reservations: Egypt, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

⁸² U.N. Treaty Collection, Ch. IV(15), CRPD, Declarations and Reservations: Estonia, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

difficult to comply, immediately, with the expectations of the UN Committee on the Rights of Persons with Disabilities. Canada is a good example of such a country. It filed the following statement, labeled as a “Declaration and Reservation”:

Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.

To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal.⁸³

Ironically, Canada is considered to be one of the leaders in implementing systems of supported decision-making. Yet the Canadian government could not guarantee full compliance with Article 12 at the time of ratification – partly because Canada is a federal system and guardianship law is determined at the provincial level. Moreover, in a democracy it can be difficult to make a complete switch from substituted to supportive decision-making. Legislators, the general public, and even family members of persons with disabilities will often resist such a move – or at least argue that it needs to be done very slowly, so as to test the new model in actual practice. Canada filed its Initial Report in 2014 and has described, in some detail, the law reform that has been undertaken in an effort to comply with Article 12.⁸⁴ However, it is clear from the provincial legislation described in Canada’s report that substituted decision making has not been completely abolished and that Canada does not intend, at this time, to withdraw its interpretative declaration.⁸⁵

⁸³ U.N. Treaty Collection, Ch. IV(15), CRPD, *Declarations and Reservations: Canada*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

⁸⁴ *Implementation of the Convention on the Rights of Persons with Disabilities, Initial Reports Submitted by States Parties in Accordance with Article 35 of the Convention: Canada*, submitted February 11, 2014, distributed July 7, 2015, U.N. Doc. CRPD/C/CAN/1, paragraphs 33-35 [hereinafter *Canada Initial Report*].

⁸⁵ *Id.* (In its sixteenth session, held from August-September 2016, the Committee on the Rights of Persons met to consider the “List of Issues” to be sent to the Canadian government; as of this writing, the interactive dialogue with the Canadian delegation had not been scheduled but it is likely to be held in 2017).

Other governments filed somewhat narrower declarations than Canada but made it clear that they also intend to interpret Article 12 so as to permit restrictions on legal capacity in certain limited cases, so long as they are subject to safeguards. For example, Australia declared its understanding that the Convention allows for “fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.”⁸⁶ Norway,⁸⁷ the Netherlands,⁸⁸ and Poland⁸⁹ filed similar declarations, essentially reserving the right to preserve mechanisms for substituted decision making.

Governments have also been reluctant to abolish compulsory treatment orders from their legal frameworks.⁹⁰ Compulsory medical treatment is considered a form of torture in certain circumstances, which is prohibited as a *jus cogens* norm of customary international law, as well as by the CRPD, the Convention Against Torture and the International Covenant on Civil and Political Rights.⁹¹ Nonetheless, many governments are not ready to completely abandon the option of ordering compulsory medical treatment. For example, the Netherlands filed declarations to both Articles 14 and 15 of the CRPD to allow “compulsory care or treatment of persons, including measures to treat mental illnesses, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.”⁹² Similarly, although Australia claimed to recognize that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others, it filed a declaration stating that it would interpret the CRPD to allow for “compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.”⁹³

⁸⁶ U.N. Treaty Collection, Ch. IV(15), CRPD, *Declarations and Reservations: Australia*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

⁸⁷ U.N. Treaty Collection, Ch. IV(15), CRPD, *Declarations and Reservations: Norway*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

⁸⁸ U.N. Treaty Collection, Ch. IV(15), CRPD, *Declarations and Reservations: Netherlands*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

⁸⁹ U.N. Treaty Collection, Ch. IV(15), CRPD, *Declarations and Reservations: Poland*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (stating Poland declares that it will interpret Article 12 so as to allow “the application of the incapacitation, in the circumstances and in the manner set forth in the domestic law, as a measure indicated in Article 12.4, when a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct”).

⁹⁰ See, e.g., George Szmukler, Rowena Daw, and Felicity Callard, *Mental Health Law and the UN Convention on the Rights of Persons with Disabilities*, 37 Int'l J.L. & Psychiatry 245-252 (2014) (discussing possible reforms in England and Wales).

⁹¹ See, e.g., *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013), at 14-16 and 20-21 (on file with author).

⁹² *Id.*

⁹³ CRPD, *Declarations and Reservations: Australia*, *supra* note 86.

The number and the breath of these reservations and declarations alarmed activists in the disability rights movement⁹⁴ and experts on international disability rights law were mobilized to oppose them.⁹⁵ The UN High Commissioner on Human Rights also issued a policy document in 2009 that strongly criticized interpretations of Article 12 that reserved the right to maintain systems of adult guardianship and other forms of substituted decision-making.⁹⁶

This criticism may have persuaded some governments to ratify the CRPD without filing a reservation or interpretive declaration to Article 12. We cannot assume, however, that governments that chose not to file reservations and declarations are *necessarily* more supportive of the right to legal capacity than governments that filed reservations and declarations. Sometimes governments do not bother to file reservations because they have become cynical towards the non-coercive enforcement process and know that the treaty-monitoring body cannot compel them to make changes to their domestic legal frameworks.⁹⁷ It also appears likely that some governments did not file reservations simply because they did not understand that their guardianship laws violated Article 12. This became clear in 2010 when the UN Committee on the Rights of Persons with Disabilities began to review the first Initial Reports under the CRPD. The Committee found that many governments that had not filed reservations or declarations were nonetheless planning to maintain their pre-existing legal frameworks, including: adult guardianship laws; procedures for making determinations that certain defendants are “unfit” to stand trial by reason of disability; criminal defenses based upon impairments; and procedures allowing for compulsory treatment (and/or detention) on the ground of disability.

Tunisia and Spain are good examples of this phenomena. They were the first two countries to be reviewed by the Committee and neither government filed any declarations or reservations to the CRPD. However, both governments clearly lacked a genuine understanding of the obligations that they had undertaken pursuant to Article 12. For example, Tunisia’s replies to the List of Issues from the Committee reported extensive use of guardianship in Tunisia and the interactive dialogue revealed that the Tunisian

⁹⁴ See, e.g., Tina Minkowitz, *CRPD Advocacy by the World Network of Users and Survivors of Psychiatry: The Emergence of a User/Survivor Perspective in Human Rights* (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326668(describing the campaign against declarations and reservations to Article 12).

⁹⁵ *Id.* See also International Disability Alliance, *Legal on Article 12 of CRPD*, *supra* note 79.

⁹⁶ U.N. High Commissioner for Human Rights, *Annual Rep.: Thematic Study on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities*, ¶ 42, U.N. Doc. A/HRC/10/48 (Jan., 2009).

⁹⁷ For example, when China first started to ratify human rights treaties (such as the Convention on the Rights of the Child and the Covenant on Economic, Social and Cultural Rights), it filed reservations regarding provisions that the government found particularly challenging. However, it filed no reservations to the CRPD, despite numerous conflicts between the CRPD and China’s laws and policies. See Petersen, *supra* note 26.

government had not fully appreciated the likely conflicts between Tunisian law and Article 12. The Committee issued Concluding Observations calling upon the government to replace the system of substituted decision-making with supported decision-making and to also provide training on the subject “to all public officials and other stakeholders.”⁹⁸

Similarly, Spain provided, in its Initial Report, a detailed description of the provisions in the Spanish Civil Code that empower courts to limit the exercise of legal capacity when a mental or physical illness “prevents the person from managing his/her affairs unaided.”⁹⁹ Interestingly, the Spanish government described these statutory provisions as examples of its *compliance* with Article 12(3), claiming that the restrictions constituted “measures to provide persons with disabilities the support they need to exercise their legal capacity.”¹⁰⁰ The Committee used the List of Issues and also the interactive dialogue with the delegation as opportunities to press the Spanish government for details concerning the number of persons in guardianship and any plans for reforming the laws. At the conclusion of the review, the Committee urged Spain to repeal all laws allowing for guardianship and trusteeship and “replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preference.”¹⁰¹

Spain and Tunisia were not alone. Indeed, the Initial Reports of most of the governments reviewed in the early years revealed a similar lack of understanding of the requirements of Article 12. For example, China (which ratified the treaty in 2008 and submitted its Initial Report in 2010)¹⁰² was the first state party from the Asia Pacific region to be formally reviewed by the Committee. Like Spain and Tunisia, China filed no reservations to the CRPD.¹⁰³ Yet the Committee learned that a high proportion of persons with disabilities were denied their right to legal capacity. The Committee also expressed strong concerns regarding compulsory treatment, an issue that the UN Committee Against Torture

⁹⁸ Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities Tunisia*, U.N. Doc. CRPD/C/TUN/CO/1, 5th Sess., ¶¶ 22-23 (May 13, 2011).

⁹⁹ *Implementation of the Convention on the Rights of Persons with Disabilities, Initial Reports Submitted by States Parties in Accordance with Article 35 of the Convention: Spain*, U.N. Doc. CRPD/C/ESP/1, ¶ 54 (May 3, 2010) [hereinafter *Spain Initial Report*].

¹⁰⁰ *Id.* at ¶ 53.

¹⁰¹ Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities Spain*, ¶¶ 33-34, U.N. Doc. CRPD/C/ESP/CO/1, 6th Sess. (Sep. 19–23, 2011).

¹⁰² *Implementation of the Convention on the Rights of Persons with Disabilities, Initial Reports Submitted by States Parties in Accordance with Article 35 of the Convention: China*, U.N. Doc. CRPD/C/CHN/1, (Aug. 30, 2010) [hereinafter *China Initial Report*].

¹⁰³ The only reservations filed by China were on behalf of the Hong Kong Special Administrative Region; Hong Kong drafts its own reports to international human rights treaty bodies because it has its own common-law legal system, which is largely separate from China’s legal system. For discussion of Hong Kong’s reservations to the CRPD, see Carole J. Petersen, *China’s Ratification of the Convention on the Rights of Persons With Disabilities: the Implications for Hong Kong*, 38 H.K. L.J. 611-644 (2008).

also raised when it reviewed China's report under the Convention Against Torture.¹⁰⁴

After reviewing numerous Initial Reports of state parties to the CRPD, the Committee concluded that there was "general misunderstanding" regarding the obligation to "shift from the substitute decision-making paradigm to one that is based on supported decision-making."¹⁰⁵ The Committee therefore decided to facilitate interactive discussions on Article 12 and held a "Day of General Discussion" on the topic in 2009. However, the subject proved to be extremely controversial and it took five years before the General Comment was adopted. In the meantime, in 2013, the Committee reviewed the Initial Report of Australia. Australia was in a rather different position, in my view, than governments that had been reviewed in the very early stages because it had at least initiated a major public review of the subject of legal capacity and appeared to be making a genuine effort to reduce the incidence and scope of substituted decision-making.¹⁰⁶ The Committee acknowledged this effort but its Concluding Comments were, nonetheless, quite critical. In particular the Committee called upon Australia to withdraw its interpretative declaration, take immediate steps to replace substitute decision-making with supported decision-making, and bring itself into full compliance with Article 12 as interpreted by the Committee.¹⁰⁷

In 2014, the Committee finally issued its General Comment 1, interpreting states' obligations under Article 12.¹⁰⁸ Although strictly speaking governments are only legally bound by the treaty itself, a General Comment issued by the treaty-monitoring body is normally considered to be a highly authoritative interpretation of the relevant provision. However, in this case the General Comment only confirms that there is a huge gap between many governments' interpretation of Article 12 and the Committee's interpretation. Thus, it will be interesting to see whether the General Comment is as influential as the Committee (and activists) had hoped it would be.

The Committee's General Comment begins by emphasizing that legal capacity includes not only the ability to hold rights and duties (what some legal systems refer to as "legal standing") but also the ability to exercise our rights and duties (what some might refer to as "legal agency"). The General Comment also maintains that legal capacity and mental capacity are entirely separate concepts and that one does not depend upon the other. The term "mental capacity" refers to the decision-making *skills* of a person, which will naturally

¹⁰⁴ See *Concluding Observations of the Committee Against Torture: China*, 41st Sess., (Nov. 3-21, 2008), 14 U.N. Doc. CAT/C/CHN/CO/4 (Dec. 12, 2008).

¹⁰⁵ Committee on the Rights of Persons with Disabilities, *General Comment 1 – Article 12: Equal recognition before the law*, *supra* note 7.

¹⁰⁶ See, e.g., Equality, Capacity and Disability in Commonwealth Laws (DP 81), <https://www.alrc.gov.au/publications/disability-dp81>.

¹⁰⁷ Committee on the Rights of Persons with Disabilities, *Concluding Observations in relation to the initial report of Australia*, ¶¶ 24-26, U.N. Doc. CRPD/C/AUS/CO/1 (Oct. 21, 2013).

¹⁰⁸ Committee on the Rights of Persons with Disabilities, *General Comment 1*, *supra* note 7.

vary from one person to another. The Committee stressed that “perceived or actual deficits in mental capacity cannot be used by governments as justification for denying an individual his or her right to legal capacity.”¹⁰⁹

The Committee complained, in its General Comment, that Initial Reports were conflating the concepts of mental and legal capacity and revealing that persons judged to have flawed decision-making skills (often because they lived with a cognitive or psychosocial impairment) were regularly deprived of their right to make decisions.¹¹⁰ Frequently the deprivation was based solely on the diagnosis of a disability (what the Committee referred to as the “status approach”). In other cases, legal capacity was restricted because a person had made a decision that was later judged to have caused negative consequences (what the Committee referred to as the “outcome approach”) or because a person’s decision-making skills were simply considered deficient (what the Committee referred to as the “functional approach”). In the opinion of the Committee, all three approaches violate Article 12. This is because the Committee interprets Article 12 to prohibit any form of substituted decision-making and in any circumstances. Thus, the “best interests” standard (the hallmark of many guardianship systems) must be replaced by a system that fully implement’s the person’s own will and preferences.¹¹¹

The publication of the General Comment on Article 12 overlapped with the Committee’s review of the Initial Report of Republic of Korea. Although the Korean government filed its Initial Report in 2011, the report was not distributed until 2013 and the Committee did not send its List of Issues to the Korean government until the spring of 2014. The Korean government’s Replies to the List of Issues were thus submitted in June 2014 (shortly after the General Comment was released) and the interactive dialog with the Korean delegation occurred in September 2014. The review of the Korean Initial Report provides a useful case study of how the Committee has integrated its General Comment on Article 12 into the reporting process and its Concluding Observations.

The Republic of Korea is one of the countries that decided to amend its laws governing legal capacity, following ratification of the CRPD.¹¹² Its Initial Report included several paragraphs describing amendments made to the Civil Act in 2011, which came into force in July 2013. Korea did not, however, abolish substituted decision-making. In fact, Korea actually introduced a new system of adult guardianship. Indeed, although the Korean government has implied that the new law was enacted in an effort to comply with the CRPD, it also appears that the demand for adult guardianship has increased in Korea, particularly with respect to older citizens.¹¹³ This may have provided an additional incentive

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at ¶ 13.

¹¹¹ *Id.* at ¶ 27.

¹¹² The Republic of Korea became a state party to the CRPD in 2008 and did not file any reservations or interpretive declarations upon ratification.

to enact a more “modern” law, one that could have the perverse effect of increasing the number of adults who are living under guardianship.¹¹⁴

The Korean government maintains that the new guardianship system will provide greater self-determination than the pre-2013 system and allow for different levels of guardianship.¹¹⁵ In theory, this type of system is supposed to decrease the reliance on “full guardianship” in favor of less restrictive forms (such as “specific guardianship,” and “contractual guardianship”). However, preliminary reports indicate that the majority of guardianship orders are still for full guardianship and the new law has been strongly criticized by NGO reports.¹¹⁶ The National Human Rights Commission of Korea also criticized the government for failing to provide policy guidelines to those who will be administering the new law (which could influence whether guardianship orders tend to be for “full” guardianship or for the less restrictive forms). The Commission’s Report also revealed that forced hospitalization and compulsory treatment are still very common in Korea.¹¹⁷

The Committee on the Rights of Persons with Disabilities could have used the List of Issues to ask very specific questions of the Korean government regarding the operation of its new law, including: what percentage of applications for guardianship are for full guardianship as opposed to the less controlling forms; has the government undertaken any training for relevant administrators and judges, so as to ensure that the lesser forms of guardianship are used; and has the guardian-supervision mechanism described in the government’s report been applied in any specific cases?

Indeed, the Committee did request information regarding the new adult guardianship law but it did so in a manner that made it clear that anything less than full repeal of substituted decision-making would be deemed a violation of Article 12 in any event.¹¹⁸ In its Replies to the List of Issues, the Korean government did its best to present the new system as

¹¹³ Chung Ah-young, *Demand for Guardianship Increases*, Korea Times, Dec. 22, 2015, http://www.koreatimes.co.kr/www/news/nation/2016/08/116_193759.html.

¹¹⁴ Cheoljoon Chang, *Korean Elder Law for a Reasonable Development, Based on a New Constitutional Jurisprudence*, 6 J. Int’l Aging L. & Pol’y 34, 45 (2013) (noting that there is no body of “elder law” in Korea and that the field is therefore governed by scattered regulations, including laws governing guardianship).

¹¹⁵ *Implementation of the Convention on the Rights of Persons with Disabilities, Initial Reports Submitted by States Parties in Accordance with Article 35 of the Convention: Republic of Korea*, ¶¶ 56-59, U.N. Doc. CRPD/C/KOR/1 (submitted in 2011; distributed Feb. 27, 2013) [hereinafter *Korea Initial Report*].

¹¹⁶ NGO reports submitted for the Committee’s 2014 review of Korea are available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=KOR&Lang=EN.

¹¹⁷ See National Human Rights Commission of Korea, *Opinions on the First National Report of Korea on the Convention on the Rights of Persons with Disabilities*, 16-17, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=KOR&Lang=EN.

¹¹⁸ Committee on the Rights of Persons with Disabilities, *List of issues in relation to the initial report of the Republic of Korea*, ¶ 12, U.N. Doc. CRPD/C/KOR/Q/1 (May 12, 2014) (asking the government to “indicate whether this new system replaces substituted decision-making with supported decision-making in the exercise of legal capacity, and how it recognizes legal capacity of persons with disabilities on an equal basis with others”).

one of supported decision-making (which seems unlikely, especially if full guardianship remains the norm). The government also insisted that certain safeguards had been introduced, that the individual now has a right to be heard, and that the family courts “make it a principle to examine persons with mental disabilities face to face to verify their opinions and sometimes resort to assistance from communication experts to accurately comprehend their opinions.”¹¹⁹ However, the Committee did not appear to be interested in ascertaining whether these “safeguards” would make any difference in the practical application of the new Korean law on guardianship. Rather, the Committee’s Concluding Observations indicate that it considers any legal system that “continues to promote substituted decision-making instead of supported decision-making” to be contrary to Article 12.¹²⁰

In 2016, the Committee on the Rights of Persons with Disabilities reviewed the Initial Report of Thailand. Unlike the Korean government, the Thai government did not address guardianship at all in its Initial Report. Instead, under the heading of Article 12, the Thai government quoted from Section 40 of the 2007 Constitution (which provided that children, youth, women, elderly persons, and persons with disabilities shall have the right to appropriate “protection” in the judicial process) and then described a series of benefits that do not appear to be directly related to the topic of legal capacity (e.g. education services, assistive technologies, and interpretation services).

In this author’s opinion, the Korean and Thai governments are in rather different situations when it comes to implementing Article 12. Nonetheless, the Committee’s comments to the Thai government were quite similar to the comments made to the Korean government. Once again, the Committee cited its General Comment on Article 12 and noted that it was “deeply concerned about substituted decision-making and guardianship regimes for persons with disabilities.” It also urged Thailand to “repeal the regimes of substituted decision-making enshrined in ... sections 28 and 1670 of the Civil Code, and replace them with supported decision-making regimes that uphold the autonomy, will and preferences of persons with disabilities.”¹²¹

If the goal is to decrease abuse of guardianship laws and increase the autonomy of individuals with disabilities then it is strategically unwise to take such an “all or nothing” approach to Article 12. The truth is that not all legal systems that permit substituted decision-making are equally bad. Some systems have legal safeguards that are carefully applied and make a concerted effort to avoid substituted decision making. For example,

¹¹⁹ Committee on the Rights of Persons with Disabilities, *Replies of the Republic of Korea to the List of issues in relation to the initial report of the Republic of Korea*, ¶¶ 49-51, U.N. Doc. CRPD/C/KOR/Q/1/Add.1 (Jun. 27, 2014).

¹²⁰ Committee on the Rights of Persons with Disabilities, *Concluding Observations in relation to the initial report of the Republic of Korea*, ¶¶ 21, 22 U.N. Doc. CRPD/C/KOR/CO/1 (2014).

¹²¹ However, my interviews in Thailand indicate that formal guardianship is not that common and is primarily used in wealthy families when family members are concerned that an older relative might lose his or her assets.

although Canada is not ready to completely abandon the option of substituted decision-making, it appears that provisional legislatures (which govern this area of law in Canada's federal system) are making a significant effort to move towards supported decision making and to limit the use of guardianship.¹²² In contrast, the new guardianship law in Japan appears to be a full-fledged effort to encourage guardianship, particularly of older citizens.¹²³ This raises the question: when Canada and Japan are eventually reviewed by the Committee on the Rights of Persons with Disabilities will the Committee give both jurisdictions similar Concluding Observations regarding Article 12, on the ground that they both have failed to abolish substituted decision making? If so, what does this tell us about the purpose of the international reporting process?

On one hand, one can understand why the Committee is taking this approach during its review of state reports. Anything less firm would be viewed as undermining the philosophically pure position, which was adopted in the General Comment on Article 12. On the other hand, the Committee may be doing a disservice to persons with disabilities if it refuses to dig deeply into the details of law reform and to give governments credit for gradual improvements. Based upon the reservations and interpretative declarations that have been filed, the reviews that have been conducted thus far, and interviews that I have conducted with lawyers and NGOs working in the field, many governments that have ratified the CRPD simply are not prepared to completely abolish the legal mechanisms that allow for substituted decision-making. Nor are they willing to completely abolish compulsory care orders.

These same governments may, however, be persuaded to reform their legal frameworks (so that full guardianship becomes less common) and to simultaneously develop new systems of supported decision-making. It would be helpful if the UN Committee on the Rights of Persons with Disabilities would ask specific questions regarding the operation of such systems and then offer constructive critique of the new legal and administrative frameworks. If not, many governments may decide not to devote public resources or political capital to law reform relating to Article 12 – unless, of course, they are prepared to follow the Committee's recommendation that the institution of adult guardianship be completely abolished.

¹²² *Canada Initial Report*, *supra* note 84.

¹²³ *Implementation of the Convention on the Rights of Persons with Disabilities, Initial Reports Submitted by States Parties in Accordance with Article 35 of the Convention: Japan*, especially ¶¶ 73-83 (advance, unedited version) (on file with author). Interviews conducted with lawyers and others who work on disability rights in Japan tended to confirm my view that the law was enacted primarily to encourage guardianship, especially of older persons.

V. Conclusion

The conflicts that have developed between states parties to the CRPD and the Committee on the Rights of Persons with Disabilities regarding the proper interpretation of Article 12 have implications for the rights of older persons. In many cases, the desire to retain (and perhaps even promote) adult guardianship arises at least in part from governments' concerns regarding their rapidly aging populations. Certain professional groups, such as the medical profession and the legal profession, also have a vested interest in retaining systems of substituted decision making, if only because they value the legal certainty that such systems purport to provide.¹²⁴ In the short term this means that governments that have ratified the CRPD will likely continue to decline to fully implement the recommendations of the treaty-monitoring body regarding legal capacity. In the longer term, it means that governments are also very likely to resist any new treaty on the rights of older persons, particularly if it addresses the issue of legal capacity in the same manner as Article 12 of the CRPD.

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¹²⁴ See, e.g., American Bar Association/American Psychological Association Assessment of Capacity in Older Adults Project Working Group, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists*, at 12 (2008), <http://www.apa.org/pi/aging/programs/assessment/capacitypsychologist-handbook.pdf> (discussing how the aging population in the United States has created increased demand for clinicians “skilled in capacity assessment” in different contexts, including the fields of health care, financial, and legal services).